Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
	)	Comments on the IRFA
To: The Commission	)	

VIA the ECFS

COMMENTS OF FRANCOIS D. MENARD ON THE IRFA

I respectfully submit the following comments on the IRFA in the above-captioned Proceeding ("the NPRM").

These comments were developed by a Canadian citizen who has a commercial interest in the economic success of IP-enabled services in the USA as provided by regional non-affiliated independent Internet service providers.

INTRODUCTION

1. The IP-enabled services NPRM has a parallel proceeding in Canada known as CRTC Public Notice 2004-2. The public record of Public Notice 2004-2 can be accessed at the following URL: http://www.crtc.gc.ca/PartVII/eng/2004/8663/c12_200402892.htm

2. The main objectives of these comments is to document the public record of the IP enabled services NPRM with the sharply contrasting preliminary views of the CRTC outlined in Public Notice 2004-2 with the proposed rule making of the Commission outline in the IP-enabled services NPRM.

3. As an overall statement, I am of the opinion that the IRFA analysis supplied with the IP-enabled services NPRM was developed in a manner which is not compliant with the statutory obligations of the Commission to conduct an IRFA analysis that can withstand scrutiny.

4. More specifically, I note that the IRFA analysis provided by the Commission in support of the IP-enabled services NPRM fails miserably at meeting the statutory obligations of the Commission to identify the **steps taken to minimize significant economic impact** on small entities and the **significant alternatives that have been considered**.

5. I note that contrary to previous positions of the Commission in Dockets 02-33 (Wireline Broadband NPRM) and 02-52 (Cable Broadband NPRM), that the Commission has this recognized Internet Service Providers as distinct entities from carriers and resellers that may be affected by the proposed rulemaking in the IP-enabled services NPRM.

6. I note that the position taken by the Commission is outlined in §74 of the IRFA submitted as Appendix A to the NPRM which reads as follows:

> 74. The Notice expressly states that the Commission may ultimately need to differentiate among various IP-enabled services, and that regulation may be deemed inappropriate with regard to most, if not all, IP-enabled services, applications or providers. **It thus seeks comment on the appropriate grounds on which to differentiate among providers of IP-enabled services**. The Notice further seeks comment on the appropriate legal classification for each category of IP-enabled services, and on which regulatory requirements, if any, should be applied to services falling into each category. **The Notice makes no conclusions regarding which regulations, if any, would apply to any entity, including small entities**. We seek comment here on the effect various proposals will have on small entities, and on the effect alternative rules would have on those entities. (**Emphasis added**)

7. The Commission recognizes having a statutory obligation to perform an IRFA which requires it to outline the steps taken to minimize significant economic impact that the proposed rulemaking would have on Internet Service Providers and also recognizes having statutory obligations to consider the significant alternatives to the proposed rulemaking.

8. I understand that the reason why a decision has yet to be issued in Docket 02-52 is mainly due to the impact of the Brand X decision and the more recent denial of the 9th Circuit Court for an En Banc re-hearing, which has been followed by announcements that the Commission would appeal of the Decision to the Supreme Court.

9. I note that the Commission is statutorily obligated to consider the significant alternatives to the proposed rulemaking outlined in the IP-enabled services NPRM as part of the IRFA analysis that it is required to file in conjunction with the NPRM. I submit that the decision of the Commission to seek an appeal of the Brand X decision at Supreme Court does not allow the Commission to avoid its statutory obligation to conduct an IRFA analysis that outlines the significant alternatives considered to the proposed rulemaking in the IP-enabled services NPRM.

10. A plain reading of §74 of the NPRM shows that the Commission considers has having met its statutory obligations as the IRFA analysis demonstrates that the Commission has miserably failed to consider the significant alternatives to the proposed rulemaking when it paragraph cannot satisfy the requirements of the paragraph note that contrary to previous positions of the Commission in Dockets 02-33 (Wireline Broadband NPRM) and 02-52 (Cable Broadband NPRM), that the Commission has this recognized Internet Service Providers as distinct entities from carriers and resellers that may be affected by the proposed rulemaking when it ignores the instructions of the 9th Circuit Court by not listing as significant alternatives that the economic regulation of the underlying facilities of cable carriers as being a significant alternative to the proposed rulemaking.

11. More specifically, I consider that the following two arguments of the Commission in §74 of the IRFA by to be misleading and erroneous statements:

> **# 1 It thus seeks comment on the appropriate grounds on which to differentiate among providers of IP-enabled services.**
>
> **# 2 The Notice makes no conclusions regarding which regulations, if any, would apply to any entity, including small entities**

12. I take issue with those two arguments and offer the following comments as I contend that those statements serve to demonstrate that the IRFA analysis provided by the Commission to support the proposed rulemaking in the IP-enabled services NPRM goes squarely against the public interest of the American public.

13. Regarding argument #1, I submit that no where in the NPRM does the Commission identifies seeking comments on the appropriate grounds on which to differentiate among providers of IP-enabled services. Rather, the NPRM seeks comments on the appropriate grounds on which to differentiate among IP-enabled **services**. This distinction is significant and should not go unnoticed by the SBA.

14. Regarding argument #2, I find it difficult to conclude that the Commission can be satisfied with the steps that it affirms having taken in to minimize significant economic impact on Internet Service Providers of the proposed rulemaking on the basis that the proposed rulemaking on the NPRM would be an appropriate answer to the current *status quo* regarding the continued unavailability of federally regulated unbundled network elements for DSL and Cable modem services.

15. In fact, I would further contend that the Commission has demonstratively not made any effort in the preparation of this NPRM to weigh the impact on non-affiliated regional Internet Service Providers of the consequence for the removal of all forms of economic regulation for broadband services provided by incumbent carriers. In most markets, wireless Internet services

are not nearly as cost effective as DSL or Cable Modem services and it is well understood that the combined market power of the duopoly formed by the incumbent telephone carrier and cable carrier is easily capable of driving out of business any wireless service provider. There are countless examples of instances where a WISP is driven out of business upon the deployment of DSL or Cable Modem services by the incumbent carriers.

16. The American public deserves better than a broadband duopoly which has the financial resources to deny any further facilities-based entry.

CONCLUSION

17. It is improper for the Commission to use the vehicle of a NPRM to bypass statutory obligations imposed on the Commission in Section 10 of the 1996 Telecommunications Act. De-regulating IP-enabled services, with no regards to the underlying infrastructure on which they ride, would not be in the public interest. It would be tantamount to the re-monopolization of broadband. Internet Service Providers which do not have a market power equal to that of the than incumbent carriers would be condemned to systematically close their doors the day that their dial-up revenues are no longer sufficient to keep them financially afloat.

18. It is necessary for the SBA to step-in and ensure that the Commission does not attempt to short circuit the judicial review of the 02-33 and 02-52 NPRMs by way of another round of service re-classification that are not supported by current judicial review.

19. At the very minimum, the SBA should direct the Commission to revise its IRFA to list the significant alternatives at its disposition to ensure that non-affiliated regional Internet Service Providers will not be condemned to bankruptcy as a direct result of the proposed rulemaking in the NPRM.

20. I invite the Commission and the SBA to pay close attention to the very limited scope of CRTC Public Notice 2004-2 and the sharply contrasting preliminary positions of CRTC Commissioners to those of the Commission. I further invite the Commission and the SBA to play closer attention to the CRTC Public Record surrounding the continued economic regulation of Canadian ILEC wireline broadband and Canadian incumbent MSO broadband offerings within the context of forbearance of retail rates for broadband Internet access in Canada.

Respectfully submitted,

/s/
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